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No.

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY, *Petitioner*,

v.

RICHARD SABO, *Respondent*.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO EXPEDITE RESOLUTION OF PETITION FOR CERTIORARI AND TO SCHEDULE ORAL ARGUMENT ON THE SAME DAY AS *HUMANA INC. V. FORSYTH*, No. 97-303

Respondent Richard Sabo, (hereinafter "Sabo"), through its counsel, respectfully opposes Petitioner's Motion to Expedite Resolution of Petition for Certiorari and further opposes the consolidation of argument with *Humana Inc. v. Forsyth*, ____ U.S. ____, 66 U.S.L.W. 3793 (No. 97-303).

Respondent recognizes that cases can be advanced for oral argument to any extent necessary where the matter is an important and urgent one. Traditionally, this Court has granted such expedition only in cases of serious urgency, predominantly involving immediate and irreparable harm to individual constitutional rights or public projects. *See, Power Authority v. Tuscarora Indian Nation*, 360 U.S. 915, 361 U.S. 892 (1959), 362 U.S. 99 (1960) (in which oral argument was advanced about a month on an asserted need to proceed

with the construction of a large power project); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (where, following an expedited briefing schedule in an important case involving a presidential claim of executive privilege, oral argument was held five-and-a-half weeks after the grant of certiorari).

Petitioner avers no threat of immediate or irreparable harm to itself or another, either of great constitutional or public import. While it argues administrative convenience of the Court, petitioner fails to address the likelihood of prejudice to respondent.

This Court granted *certiorari* in *Humana Inc. v. Forsyth*, ____ U.S.____, 66 U.S.L.W. 3793 (No. 97-303) on June 22, 1998. Under the Supreme Court Rules, a briefing schedule has already been initiated. It is unlikely that this Court will consider the instant motion until its next scheduled conference of September, 1998. The parties have not considered or agreed upon the record, so a delay in printing is likely. Respondent does not, therefore, believe that the instant case can be fully and adequately briefed in such an abbreviated manner.

Petitioner seeks to direct this Court's attention to the pure conjecture of the United States Solicitor General. In the Solicitor General's *amicus brief* in support of *certiorari* in *Humana*, he posits that the Ninth Circuit may have based its decision, at least in part, on the incorrect assumption that Nevada's insurance statutes do not provide a private right of action *Metropolitan Life Insurance Company v. Sabo*, Doc. No 98-2, *Petition for Writ of Certiorari*, pg.6, fn 6 (6/29/98). Based upon this second-tier speculation, the Solicitor General concluded that, "Humana is not the 'ideal vehicle' for resolving the conflict in the Courts of

Appeals." Brief of United States as *Amicus Curiae* at 19, *Humana, Inc. v. Forsyth*, ___ U.S. ___, 66 U.S.L.W. 3793 (No. 97-303).

The primary basis which Petitioner asserts for expedition in this case is that consideration of these cases together "would give the Court a broader perspective." *Petitioner's Motion to Expedite Resolution of Petition for Certiorari and to Schedule Oral Argument on the Same Day as Humana Inc. v. Forsyth*, No. 97-303, pg. 2. It argues that, unlike Nevada, Pennsylvania has no private cause of action available under its state insurance law, then Petitioner has stated no basis for expedition.

From speculation upon speculation, Petitioner asserts with "authority" that, therefore, the possible inadequacy identified by the Solicitor General in *Humana* is not present in the instant case. Petitioner cites no authority, rule of statutory construction, or opinion of court. Rather, Petitioner asks this Court to embrace the opinion of a biased party as an authoritative basis for this Court's decision to grant *certiorari*.

Even if, the Ninth Circuit incorrectly decided *Humana* because it assumed that Nevada's insurance statutes do not provide a private cause of action, that factual assumption is not present in *Metropolitan*. The comprehensive Pennsylvania legal and regulatory framework governing the business of insurance does provide a private cause of action.

Consequently, petitioner could not have, with any degree of candor, couched its question in precisely the same terms as those used in *Humana*.

Humana's question, in pertinent part, is stated as follows: "...but the remedies provided [under the comprehensive state law frame work and RICO] are materially different." *Humana, Inc. v. Forsyth*, ___ U.S. ___, 66 U.S.L.W. 3793 (No. 97-303); *See*,

Petition for Writ of Certiorari, Question Presented, pg. i (8/18/97). Petitioner states the instant question, in pertinent part, as: "...RICO provides extraordinary mandatory remedies that are not available under the comprehensive state law framework and would upset the balance of remedies established by the lawmakers." *Metropolitan Life Insurance Company v. Sabo*, Doc. No 98-2, *Petition for Writ of Certiorari*, Question presented, pg.i (6/29/98).

Petitioner has been less than candid with the Court; it has proffered an incomplete recitation of the facts. Pennsylvania has adopted a comprehensive regulatory framework which provides both private and administrative causes of action, including civil remedies similar to those provided under the federal Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO")(18 U.S.C. § 1961 *et. seq.*).

The Third Circuit held that the adoption of the Pennsylvania Unfair Insurance Practices Act, 40 Pa. Cons. Stat. Ann. §§ 1171.1 to 1171.15 (West 1992) (hereinafter "UIPA") preserved common law actions for fraud and deceit arising out of insurance practices. *Sabo v. Metropolitan Life Insurance Company*, 137 F.3d 185 (3rd Cir. 1998).

More importantly, it found that the adoption of the UIPA preserves a private cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (hereinafter "UIPA and CPL"), 73 Pa. Cons. Stat. Ann. §201-1 to 201-9.2 (West 1993). Citing this Pennsylvania Statute, the Third Circuit expressly found that these statutes [UIPA and CPL] "provide a private remedy and treble damages for victims of insurance fraud." *Sabo v. Metropolitan Life Insurance Company*, 137 F. 3d 185 (3rd Cir. 1998).

Finally, petitioner argues that this Court is charged with establishing a single policy governing the applicability of RICO to insurance law in all 50 states. This argument is inherently flawed.

Under the *McCarren-Ferguson Act*, 15 U.S.C. § 1101 *et seq.*, different decisions will occur not only between the Circuits, but within the Circuits. It is expected that, where each state may adopt its own independent regulatory scheme for the enforcement of insurance laws, that the rights and liabilities of the parties will vary between those states as a function of that diversity. This is the very reason that Congress adopted the *McCarren-Ferguson Act*, 15 U.S.C. § 1101 *et seq*. If petitioner's proposition were carried to its logical conclusion, it would destroy the very authority reserved to the states under the *McCarren-Ferguson Act*.

Petitioner suggests that there is an issue of national concern solely upon the basis that, both, *Humana* and *Metropolitan* implicate RICO. Petitioner's focus is misplaced.

The *McCarren-Ferguson Act* is a statute of distinction, not commonality. It is axiomatic that a blanket approach is inappropriate and in direct contravention to the implementation of an act designed to preserve the diversity of powers reserved to the several states.

It is uncontested that *Humana* and *Metropolitan* involve two separate states with two completely separate frameworks for insurance regulation. This fact alone fundamentally distinguishes theses cases and demands their separate treatment.

The *McCarren-Ferguson Act* stands for nothing if not for the proposition that each state and its regulatory schemes must be treated autonomously and independently. This requires a case-by-case analysis of the particular facts and the legislative intent underlying

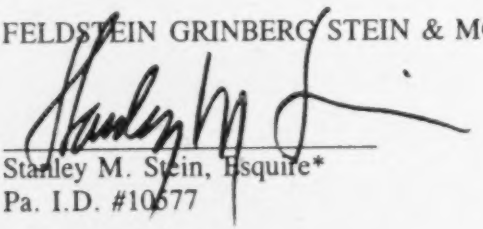
each individual state's comprehensive regulatory and statutory framework governing the business of insurance.

This Court is a court of policy and *certiorari* will be granted only when there are special and important reasons therefor. It is of critical import that the facts of *Humana* and *Metropolitan* not be intermingled. To do otherwise would confuse and obfuscate the issues in both cases and risk skewing or biasing the decision of this Court.

Wherefore, respondent prays that the Court deny Petitioner's Motion to Expedite Resolution of Petition and to Schedule Oral Argument on the same day.

Respectfully Submitted

FELDSTEIN GRINBERG STEIN & MCKEE



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